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7

8 **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
**REGION IX**

9 75 Hawthorne Street  
10 San Francisco, California 94105

11 IN THE MATTER OF:

) DOCKET NO. UIC-09-2017-\_\_\_\_\_

12 Kamehameha Schools  
Respondent.

13 Proceedings under Sections 1423(c) of the  
14 Safe Drinking Water Act,  
42 U.S.C. § 300h-2(c).

)  
)  
) **CONSENT AGREEMENT**  
) **AND**  
) **FINAL ORDER**

15 \_\_\_\_\_  
16 **CONSENT AGREEMENT**

17 **I. AUTHORITIES AND PARTIES**

18 1. The United States Environmental Protection Agency (“EPA”), Region IX and  
19 Trustees of the Estate of Bernice Pauahi Bishop, doing business as Kamehameha Schools,  
20 (“Respondent”) (collectively the “Parties”) agree to settle this matter and consent to the filing of  
21 this Consent Agreement and Final Order (“CA/FO”). The CA/FO commences and concludes  
22 this proceeding in accordance with 40 C.F.R. §§ 22.13(b), 22.18(b)(2) and 22.45(b).

23 2. This is a civil administrative action brought by EPA Region IX against  
24 Respondent pursuant to Section 1423(c) of the Safe Drinking Water Act (“SDWA”), 42 U.S.C. §

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1 300h-2(c), for violations of the SDWA and the Underground Injection Control (“UIC”)  
2 requirements set forth at 40 C.F.R. Part 144.

3 3. Complainant is the Director of the Enforcement Division, EPA Region IX. The  
4 Administrator of EPA delegated to the Regional Administrator of EPA Region IX the authority  
5 to bring and settle this action under the SDWA. In turn, the Regional Administrator further  
6 delegated the authority to bring this action and sign a consent agreement settling this action under  
7 the SDWA to the Director of the Enforcement Division.

8 4. Respondent is a charitable trust headquartered at 567 South King Street,  
9 Honolulu, ~~Hawaii~~Hawai‘i, 96813.

## 10 II. APPLICABLE STATUTES AND REGULATIONS

11 5. Pursuant SDWA Sections 1421 to 1429, 42 U.S.C. §§ 300h to 300h-8, EPA has  
12 promulgated regulations at 40 C.F.R. Part 144 establishing minimum requirements for UIC  
13 programs to prevent underground injection that endangers drinking water sources.

14 6. “Underground injection” means the subsurface emplacement of fluids by well  
15 injection. 42 U.S.C. § 300h(d)(1); 40 C.F.R. § 144.3.

16 7. “Well injection” means the subsurface emplacement of fluids through a well. 40  
17 C.F.R. § 144.3.

18 8. “Well” means, in relevant part, a dug hole whose depth is greater than the largest  
19 surface dimension. 40 C.F.R. § 144.3.

20 9. A “cesspool” is a “drywell,” which in turn is a “well,” as those terms are defined  
21 in 40 C.F.R. § 144.3.

22 10. “Large capacity cesspools” (“LCCs”) include “multiple dwelling, community or  
23 regional cesspools, or other devices that receive sanitary wastes, containing human excreta,  
24 which have an open bottom and sometimes perforated sides.” 40 C.F.R. § 144.81(2). LCCs do

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1 not include single-family residential cesspools or non-residential cesspools which receive solely  
2 sanitary waste and have the capacity to serve fewer than 20 persons per day. *Id.*

3 11. UIC program regulations classify LCCs as Class V UIC injection wells. 40 C.F.R.  
4 § 144.80(e).

5 12. Class V UIC injection wells are considered a “facility or activity” subject to  
6 regulation under the UIC program. 40 C.F.R. § 144.3.

7 13. “Owner or operator” means the owner or operator of any “facility or activity”  
8 subject to regulation under the UIC program. 40 C.F.R. § 144.3.

9 14. The “owner or operator” of a Class V UIC well must comply with Federal UIC  
10 requirements in 40 C.F.R. Parts 144 through 147, and must also comply with any other measures  
11 required by your State or EPA Regional Office UIC Program to protect [underground sources of  
12 drinking water]. 40 C.F.R. § 144.82.

13 15. Owners or operators of existing LCCs were required to have closed those LCCs  
14 no later than April 5, 2005. 40 C.F.R. §§ 144.84(b)(2) and 144.88.

15 16. Pursuant to Section 1422(c) of the SDWA, 42 U.S.C. § 300h-1(c), and 40 C.F.R.  
16 § 147.601, EPA administers the UIC program in the State of ~~Hawaii~~Hawai‘i. This UIC program  
17 consists of the program requirements of 40 C.F.R. Parts 124, 144, 146, 147 (Subpart M), and  
18 148.

19 17. Pursuant to Section 1423(c)(1) of the SDWA, 42 U.S.C. § 300h-2(c)(1), and 40  
20 C.F.R. § 19.4, EPA may issue an administrative order either assessing a civil penalty of not more  
21 than \$21,916 per day per violation up to a maximum of \$273,945, or requiring compliance, or  
22 both, against any person who violates the SDWA or any requirement of an applicable UIC  
23 program.

### 24 III. ALLEGATIONS

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1 18. Respondent is an association and thus qualifies as a “person” within the meaning  
2 of Section 1401(12) of the SDWA, 42 U.S.C. § 300f(12), and 40 C.F.R. § 144.3.

3 19. Between at least November 2012 and July 26, 2017, Respondent owned at least  
4 one cesspool with the capacity to serve twenty or more persons per day, meeting the definition of  
5 LCC as that term is defined at 40 C.F.R. § 144.81(2).

6 20. The LCC referenced in Paragraph 20 was located at 99-1622 Piimauna Drive,  
7 Volcano, HI 96785 and has been there since at least November 2012.

8 21. Hawaiian International Sporting Club Inc., who leases the Property from  
9 Respondent, closed the LCC referenced in Paragraph 20 and replaced it with a septic system that  
10 was approved for use by the State of Hawaii Department of Health on July 26, 2017.

11 22. The LCC referenced in Paragraph 20 was not closed by April 5, 2005.

12 23. Respondent has owned the property at 99-1622 Piimauna Drive, Volcano, HI  
13 96785 since at least November 2012.

14 24. Respondent owns at least ~~(XX)~~3000 other properties in ~~Hawaii, many~~the state of  
15 Hawai‘i, at least some of which may also contain LCCs.

16 25. Respondent’s failure to close an LCC by April 5, 2005 constitutes a violation of  
17 40 C.F.R. §§ 144.84(b)(2) and 144.88.

#### 18 IV. SETTLEMENT TERMS

##### 19 A. General Provisions

20 26. For the purposes of this proceeding, Respondent (1) admits the jurisdictional  
21 allegations contained in this CA/FO; (2) neither admits nor denies the specific factual allegations  
22 contained in this CA/FO; (3) consents to the assessment of the penalty specified and to the  
23 specified compliance obligations contained in this CA/FO, and (4) and waives any right to  
24 contest the allegations or to the right to appeal the proposed final order accompanying the  
consent agreement. 40 C.F.R. § 22.18(b)(2).

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1           27. This CA/FO shall be the entire agreement between the Parties to resolve EPA's  
2 civil claims and causes of action alleged under 40 C.F.R. §§ 144.84(b)(2) and 144.88. Full  
3 //  
4 compliance with this CA/FO shall constitute settlement of Respondent's liability for federal civil  
5 claims for the SDWA violations identified in Section III of this CA/FO. Nothing in this  
6 agreement should be construed as resolving or otherwise reducing liability arising from the  
7 violation of the SDWA at 99-1622 Piimauna Drive, Volcano, HI 96785 alleged in this CA/FO  
8 for any person or entity other than Respondent, except as set forth in Paragraph 28.

9           28. The provisions of this CA/FO shall apply to and be binding upon Respondent, its  
10 officers, directors, agents, servants, authorized representatives, employees, and successors or  
11 assigns. Action or inaction of any persons, firms, contractors, employees, agents, or corporations  
12 acting under, through, or for Respondent shall not excuse any failure of Respondent to fully  
13 perform its obligations under this CA/FO.

14           29. Nothing in this CA/FO is intended to impair any private contractual duties, rights  
15 or obligations by and between Respondent and third parties.

16           30. ~~29-~~ Issuance of this CA/FO does not in any manner affect the right of EPA to  
17 pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of  
18 law, except with respect to those claims against Respondent described in Paragraph ~~23~~25 that  
19 have been specifically resolved by this CA/FO.

20           31. ~~30-~~ This CA/FO is not a permit or modification of a permit, and does not affect  
21 Respondent's obligation to comply with all federal, state, local laws, ordinances, regulations,  
22 permits, and orders. Issuance of, or compliance with, this CA/FO does not waive, extinguish,  
23 satisfy, or otherwise affect Respondent's obligation to comply with all applicable requirements of  
24 the SDWA, regulations promulgated thereunder, and any order or permit issued thereunder,  
except as specifically set forth herein.

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1           32.   ~~31.~~ EPA reserves any and all legal and equitable remedies available to enforce this  
2 CA/FO, as well as the right to seek recovery of any costs and attorneys' fees incurred by EPA in  
3 any actions against Respondent for noncompliance with this CA/FO.

4           33.   ~~32.~~ Unless otherwise specified, the Parties shall each bear their own costs and  
5 attorneys' fees incurred in this proceeding.

6           34.   ~~33.~~ This CA/FO may be executed and transmitted by facsimile, email or other  
7 electronic means, and in multiple counterparts, each of which shall be deemed an original, but all  
8 of which shall constitute an instrument. If any portion of this CA/FO is determined to be  
9 unenforceable by a competent court or tribunal, the Parties agree that the remaining portions shall  
10 remain in full force and effect.

11           35.   ~~34.~~ The undersigned representative of each party certifies that he or she is duly  
12 and fully authorized to enter into and ratify this CA/FO.

13           36.   ~~35.~~ Unless otherwise specified elsewhere in this CA/FO, all written  
14 communications required by this CA/FO shall be addressed as follows:

15           For EPA:

16           Jelani Shareem, Enforcement Officer  
17           U.S. Environmental Protection Agency  
18           Region IX - Enforcement Division  
19           75 Hawthorne Street (ENF-3-3)  
20           San Francisco, CA 94105

21           Kimberly Wells, Attorney Advisor  
22           U.S. Environmental Protection Agency  
23           Region IX – Office of Regional Counsel  
24           75 Hawthorne Street (ORC-2-3)  
              San Francisco, CA 94105

              For Respondent:

              Sheryl Nicholson, Assistant General Counsel

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Office of the Vice President, Legal Group  
Kamehameha Schools  
567 South King Street, Suite 310  
Honolulu, HI 96813

37. ~~36.~~ Respondent shall include the following signed certification made in accordance with 40 C.F.R. § 144.32(b) and (d) with all written communications required by this CA/FO:

*I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.*

B. Penalty

38. ~~37.~~ Respondent agrees to the assessment of a civil penalty in the amount of ninety-nine thousand five hundred and thirty-one dollars (\$99,531) for the violation of the SDWA at 99-1622 Piimauna Drive, Volcano, HI 96785, alleged in Section III of this CA/FO.

39. ~~38.~~ Respondent shall pay the assessed penalty no later than thirty (30) days from the Effective Date of this CA/FO.

40. ~~39.~~ Respondent may pay the penalty by check (mail or overnight delivery), wire transfer, automated clearing house, or online payment. Payment instructions are available at: <http://www2.epa.gov/financial/makepayment>. Payments made by a cashier's check or certified check must be payable to the order of "Treasurer, United States of America" and delivered to the following address:

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1 U.S. Environmental Protection Agency  
2 Fines and Penalties  
3 Cincinnati Finance Center  
4 P.O. Box 979077  
5 St. Louis, Missouri 63197-9000

6 41. ~~40.~~ Concurrent with making the payment, Respondent must provide a letter with  
7 evidence of the payment made pursuant to Paragraphs ~~38,38~~ through 40, accompanied by the title  
8 and docket number of this action, to the EPA Region IX Regional Hearing Clerk, the EPA  
9 Region IX Enforcement Division Enforcement Officer, and the EPA Region IX Office of  
10 Regional Counsel attorney, via United States mail, at the following addresses:

11 Regional Hearing Clerk  
12 U.S. Environmental Protection Agency  
13 Region IX - Office of Regional Counsel  
14 75 Hawthorne Street (ORC-1)  
15 San Francisco, CA 94105

16 Jelani Shareem, Enforcement Officer  
17 U.S. Environmental Protection Agency  
18 Region IX - Enforcement Division  
19 75 Hawthorne Street (ENF-3-3)  
20 San Francisco, CA 94105

21 Kimberly Wells, Attorney Advisor  
22 U.S. Environmental Protection Agency  
23 Region IX - Office of Regional Counsel  
24 75 Hawthorne Street (ORC-2-3)  
San Francisco, CA 94105

42. ~~41.~~ In accordance with the Debt Collection Act of 1982 and 40 C.F.R. Part 13  
interest, penalty charges, and administrative costs will be assessed against the outstanding  
amount that Respondent owes to EPA for Respondent's failure to pay the civil administrative  
penalty by the deadline specified in Paragraph ~~37,39~~.

43. ~~42.~~ Interest on delinquent penalties will be assessed at an annual rate that is equal  
to the rate of current value of funds to the United States Treasury (i.e., the Treasury tax and loan

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1 account rate) as prescribed and published by the Secretary of the Treasury in the Federal Register  
2 and the Treasury Fiscal Requirements Manual Bulletins. 40 C.F.R. § 13.11(a)(1).

3 44. ~~43.~~ A penalty charge will be assessed on all debts more than 90 days delinquent.  
4 The penalty charge will be at a rate of 6% per annum and will be assessed monthly. 40 C.F.R. §  
5 13.11(c).

6 45. ~~44.~~ In addition, administrative costs for handling and collecting Respondent's  
7 overdue debt will be assessed based on either actual or average cost incurred, and will include  
8 both direct and indirect costs. 40 C.F.R. § 13.11(b).

9 46. ~~45.~~ Failure to pay any civil administrative penalty by the deadline may also lead to  
10 any or all of the following actions:

- 11 a. The debt being referred to a collection agency, a credit reporting agency, or to  
12 the Department of Justice for filing of a collection action in the appropriate  
13 United States District Court. 40 C.F.R. §§ 13.13, 13.14, and 13.33. In any  
14 such collection action, the validity, amount, and appropriateness of the  
15 assessed penalty and of this CA/FO shall not be subject to review.
- 16 b. The department or agency to which this matter is referred (e.g., the  
17 Department of Justice, the Internal Revenue Service) may assess  
18 administrative costs for handling and collecting Respondent's overdue debt in  
19 addition to EPA's administrative costs.
- 20 c. EPA may (i) suspend or revoke Respondent's licenses or other privileges; or  
21 (ii) suspend or disqualify Respondent from doing business with EPA or  
22 engaging in programs EPA sponsors or funds. 40 C.F.R. § 13.17.

23 47. ~~46.~~ Respondent shall tender any interest, handling charges, late penalty payments,  
24 and stipulated penalties in the same manner as described in Paragraphs 40 through ~~42-41~~

### C. Compliance

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1            ~~48.~~    ~~47.~~ Respondent shall perform a compliance audit (“Audit”) of its properties in  
2 ~~Hawaii~~ the state of Hawai‘i to identify and close all identified LCCs.

3            ~~49.~~    a. EPA and Respondent agree that violations reported or otherwise disclosed to  
4 EPA under, and in accordance with, this CA/FO and the applicable provisions of  
5 EPA’s Incentives for Self-Policing: Discovery, Disclosure, Correction and  
6 Prevention of Violations (“Audit Policy”), 65 Fed. Reg. 19,618 (Apr. 11, 2000),  
7 shall be eligible for 100% mitigation of gravity-based penalties. The parties  
8 further agree that this CA/FO is intended to serve the objectives of, and be  
9 interpreted in harmony with, the Audit Policy. In the event of an actual or  
10 perceived conflict between the terms of this CA/FO and of the Audit Policy, the  
11 parties agree that the terms of this CA/FO shall prevail in regard to whether or not  
12 the criteria set forth in the Audit Policy have been met.

13            ~~50.~~    ~~48.~~ The Audit shall comply with the following requirements:

- 14            a. Scope of Audit: ~~Within thirty (30) calendar days of the effective date of this~~  
15 ~~CA/FO, Respondent shall submit to EPA for approval a list of all properties that~~  
16 ~~it owns in Oahu, identified by address, Tax Map Key, description of the use of~~  
17 ~~the property, and divided into Target and Non-Target Property categories.~~  
18 ~~Within ninety (90) calendar days of the effective date of this CA/FO, Respondent~~  
19 ~~shall submit to EPA for approval a list of all properties that it owns in the rest of~~  
20 ~~the Hawaiian Islands, identified by address, Tax Map Key, description of the use~~  
21 ~~of the property, and divided into Target and Non-Target Property categories.~~  
22 ~~Sufficient documentation must be provided showing that all Non-Target~~  
23 ~~Properties do not contain an LCC~~ The Audit will be conducted in three phases: (1)  
24 Oahu; (2) Kauai/Maui/Molokai (“KMM”); and (3) the island of Hawai‘i (“Big  
Island”). The term “Audit” as used herein refers collectively to all three phases.

1 All Target Properties will be subject to the Audit. The following definitions  
2 apply:

- 3 i. Target Properties: This includes all properties owned by Respondent in  
4 Hawaii that contain or potentially contain an LCC and are not otherwise  
5 excluded by EPA's approval as a Non-Target Property.
- 6 ii. Non-Target Properties: Non-Target Properties include those that are (A)  
7 connected to a sewer system, (B) contain an Individual Wastewater System  
8 ("IWS") or an alternative similar non-cesspool Hawai'i Department of  
9 Health ("HDOH")- approved permitted waste water treatment system, (C)  
10 undeveloped land not containing a cesspool, or (D) vacant, including but not  
11 limited to land having a "Building Value" of zero according to government  
12 tax records as of the Effective Date of this CA/FO, or (D) is not a "High  
13 Use" property that would indicate the presence of an LCC or is otherwise  
14 served by cesspool(s) that are not LCCs (i.e. small capacity cesspools).  
15 "High Use" refers to the type of activities that the HDOH<sup>1</sup> associates with  
16 large volume onsite sewage disposal systems (e.g., businesses, golf courses,  
17 churches, cemeteries, non-profit organizations, parks, and schools), and  
18 multi-family dwellings such as multiple single family dwellings, duplexes,  
19 residential condominiums, dormitories, townhouse developments, and  
20 apartment buildings. For those properties identified as Non-Target  
21 Properties under category D (small capacity cesspools), Respondent shall  
22 provide. Respondent shall rely on Sufficient Documentation (as described  
herein) to make its determination that a particular property is a Non-Target

23 <sup>1</sup> See Robert B. Whittier and Aly I. El-Kadi, State of Hawai'i Department of Health, HUMAN AND ENVIRONMENTAL RISK  
24 RANKING OF ONSITE SEWAGE DISPOSAL SYSTEMS at 19 (Dec. 2009), available at  
[https://health.hawaii.gov/wastewater/files/2015/09/OSDS\\_OAHU.pdf](https://health.hawaii.gov/wastewater/files/2015/09/OSDS_OAHU.pdf); Memo from HDOH to Consulting  
Engineers re *Large Capacity Cesspools*, Aug. 13, 2004, available at  
<https://health.hawaii.gov/wastewater/files/2013/06/lccmemo.pdf>

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1 Property. Respondent shall make said documentation available for EPA's  
2 inspection at EPA's request. Respondent shall, at the EPA's request, make  
3 available for inspection, the documentation of the current use of the  
4 property and a certification that the cesspool shall remain a small capacity  
5 cesspool, based upon use, for so long as Respondent continues to own the  
6 property at the time of the Audit.

7 iii. Sufficient Documentation:

8 1. iii. Sufficient Documentation: Sufficient  
9 documentation Documentation shall include, but is not limited to,  
10 HDOH permits or approvals of IWSs or alternative wastewater  
11 treatment systems; sewer hookup approvals; sewer lateral data and  
12 maps showing that a sewer lateral crosses or touches a particular  
13 property, sewer bills documenting sewer service; land surveys,  
14 studies, HDOH closure reports or approvals, building plans, or other  
15 documents indicating that there are no cesspools on the Property or  
16 that all cesspools on the property have been closed; Tax Map Key  
17 code showing that a Property contains only a single-family residence;  
18 and blueprints of wastewater treatment systems located on the  
19 Property. To the extent any documentation relied upon by  
20 Respondent is not maintained, compiled, provided, or managed by a  
21 government agency, Respondent shall maintain such documentation  
22 for inspection by the EPA for a period of five years from the  
23 Effective Date of this CA/FO.

24 2. Efficacy Study: For Non-Target Properties under category D in  
Paragraph 50(a)(ii), Sufficient Documentation may include written

1 confirmation by an employee of Respondent who manages the  
2 particular property (“Asset Manager”) that the Non-Target Property  
3 is not a “High Use” property based on his/her personal knowledge,  
4 subject to an Efficacy Study demonstrating sufficient reliability and  
5 accuracy of the Asset Managers’ knowledge. The Efficacy Study  
6 shall be an iterative process conducted at each phase of the Audit  
7 prior to submitting the Non-Target Properties to EPA for approval.  
8 Each iteration shall consist of inspections of “Sample Properties.”  
9 comprised of the lesser of: (a) twenty-five (25) properties that  
10 Respondent has identified as Non-Target Properties in that phase  
11 based solely on Asset Manager knowledge; or (b) twenty-five (25)  
12 per cent of the properties in that phase that Respondent has identified  
13 as Non-Target Properties based solely on Asset Manager knowledge.  
14 The Sample Properties shall be randomly selected by the Auditor and  
15 inspected in accordance with Paragraph 50(e). The Auditor shall  
16 have forty (40) days to conduct the 25 inspections. “Sufficient  
17 reliability and accuracy” of the Asset Managers’ knowledge for the  
18 purposes of this section shall mean that the Auditor confirms that at  
19 least 88% of the Sample Properties in that iteration do not have an  
20 LCC. If 12% of the Sample Properties in that iteration of the  
21 Efficacy Study are confirmed or suspected to have an LCC, then the  
22 Auditor and Respondent shall work together to amend or add to the  
23 criteria and/or factors considered by the Asset Managers in making  
24 their “High Use” determination. Auditor shall conduct a further  
iteration of the Efficacy Study using an additional 25

1 randomly-selected properties that have been identified as Non-Target  
2 Properties by the Asset Managers under the modified criteria and/or  
3 factors. The Auditor shall conduct further iterations of the Efficacy  
4 Study, as needed to demonstrate sufficient reliability and accuracy,  
5 or until the Auditor and Respondent agree that further iterations  
6 would be futile. If the Efficacy Study of a particular phase does not  
7 demonstrate sufficient reliability and accuracy of Asset Managers’  
8 knowledge, then any properties categorized as Non-Target Properties  
9 in that phase based solely on Asset Managers’ knowledge shall be  
10 recategorized as Target Properties.

11 iv. All Target Properties must be Audited and addressed in the Initial Audit-  
12 Report audit reports, prepared pursuant to Paragraph 48-Paragraphs 51.

13 b. Third Party Landowners and Lessees

14 i. Subpart G of Title 40, Part 144 of the CER imposes liability on any owner  
15 or operator of a Class V well (which includes a LCC). 40 CFR 144.81. The  
16 Parties anticipate that at least some properties within the scope of the Audit  
17 are owned or operated by third parties, including, e.g., lessees.

18 ii. If, during the course of the Audit, SDWA violations are found on properties  
19 owned or operator by third parties (“Third Party Properties”), the penalty  
20 mitigation considerations set forth in Paragraph 49 will apply to a third party  
21 owner or operator if, within thirty (30) days of the Third Party Auditor’s  
22 inspection of those Third Party Properties owned or operated by the third  
23 party, such third party landowner or operator has entered into an “Opt-In  
24 Agreement” in the form approved by the EPA and attached hereto as Exhibit

A. Third party owners and operators that enter into an Opt-In Agreement

1 shall be referred to herein as “Opt-In Parties.” Under the Opt-In Agreement,  
2 an Opt-In Party shall, among other things, be jointly liable with Respondent  
3 for compliance with the terms of Section IV(C) and (D) of this CA/FO,  
4 including but not limited to adherence to the deadlines set forth in those  
5 sections and the payment of any stipulated penalties, for the Third Party  
6 Properties that are owned or operated by the Opt-In Party. The Opt-In  
7 Agreement shall not be construed as imposing liability on any Opt-In Party  
8 for SDWA violations that are on properties not owned, leased, or otherwise  
9 operated by that Opt-In Party.

10 c. ~~b.~~ Independent Third- Party Auditor

- 11 i. Third Party Auditor: The Audit as well as the Efficacy Study of each  
12 Phase shall be conducted by an independent third-party auditor (the  
13 “Auditor”). Respondent shall have the Auditor: (a) supervise the  
14 preparation of and; (b) prepare and sign the Initial Audit  
15 ReportCompletion Reports as required under Paragraph 4851 of this  
16 CA/FO; and (c) prepare and sign the LCC Closure Reports as required  
17 under Paragraph 53 of this CA/FO.
- 18 ii. Recordkeeping: Respondent shall include in its written agreement with  
19 the Auditor a provision requiring the Auditor to prepare and maintain  
20 contemporaneous records when supervising or assisting in the conduct of  
21 the Audit.
- 22 iii. Approval of Auditor: No later than thirty (30) calendar days following the  
23 ~~effective date~~ Effective Date of this CA/FO, Respondent shall notify EPA  
24 in writing of Respondent’s choice of the Auditor, and provide a  
curriculum vitae and list of past cesspool projects performed by the

1 proposed Auditor. At its sole discretion, EPA may approve or disapprove  
2 Respondent's choice of the Auditor, but such approval shall not be  
3 unreasonably withheld. Within fifteen (15) calendar days of EPA's  
4 receipt of Respondent's notice of its choice of an Auditor, EPA will  
5 respond in writing to Respondent's nomination. If EPA notifies  
6 Respondent that Respondent's choice of an Auditor is unacceptable,  
7 Respondent shall have additional thirty (30) calendar days in which to  
8 nominate a different Auditor, and to provide the information required by  
9 this Paragraph.

10 ~~d. Audit Commencement Date: The Audit Commencement Date shall be within~~  
11 ~~thirty (30) calendar days after the date on which Respondent receives EPA's~~  
12 ~~written approval of the Auditor and Target Property list. Schedule:~~

13 ~~d. Audit Schedule: Prior to or at the time of the Audit Commencement Date,~~  
14 ~~Respondent shall submit to EPA an Audit schedule that includes the following:~~

15 ~~i. An Audit Completion Date of sixteen (16) months from the Audit~~  
16 ~~Commencement Date. Respondent shall commence the Efficacy Study for~~  
17 ~~the Oahu phase within thirty (30) calendar days of the EPA's approval of the~~  
18 ~~Third Party Auditor.~~

19 ~~ii. Identification of the phases of the Audits, if any, to be employed by the~~  
20 ~~Respondent. For instance, Respondent may initially focus on a particular~~  
21 ~~Island or target sizes or classes of Target Properties, such as larger ones or~~  
22 ~~those with concerns about access. The Efficacy Study for the KMM phase~~  
23 ~~shall commence within thirty (30) calendar days of the submission of the~~  
24 ~~Oahu Audit Completion Report to EPA.~~

1           iii. The Efficacy Study for the Big Island phase shall commence within thirty  
2           (30) days of the submission of the KMM Audit Completion Report to EPA  
3           iv. For each phase of the Audit, Respondent shall submit to EPA a project  
4           schedule. The project schedule for each phase shall be submitted within  
5           thirty (30) calendar days after the completion date of the Efficacy Study for  
6           that phase. The project schedule for the respective phases should include the  
7           following:

8           v. For the Oahu Phase:

- 9                   1. Within thirty (30) calendar days of the completion of the Efficacy  
10                  Study of the Oahu phase, Respondent shall submit to EPA for  
11                  approval a list of Target Properties in Oahu, identified by address,  
12                  Tax Map Key, land use classification, and (if applicable) the “High  
13                  Use” category of the property.  
14                   2. If the number of Target Properties in Oahu does not exceed 100, the  
15                  Oahu Audit Completion Date shall be within sixty (60) days after the  
16                  date on which Respondent receives EPA’s written approval of the  
17                  Auditor and Target Property list for Oahu. If the number of Target  
18                  Properties in Oahu is greater than 100, then the Oahu Audit  
19                  Completion Date shall be determined using the following  
20                  calculation: One and one-half (1.5) business days multiplied by the  
21                  number of Target Properties in Oahu, running from when  
22                  Respondent receives EPA’s written approval of the Auditor and  
23                  Target Property list for Oahu.

24           vi. For the KMM Phase:

1. Within thirty (30) calendar days of the completion of the Efficacy Study of the KMM phase, Respondent shall submit to EPA for approval a list of Target Properties for KMM, identified by address, Tax Map Key, land use classification, and (if applicable) the “High Use” category of the property.
2. The KMM Audit Completion Date shall be sixty (60) days from the date the EPA approves the Target Property list for KMM.

vii. For the Big Island Phase:

1. Within thirty (30) calendar days of the completion of the Efficacy Study of the Big Island phase, Respondent shall submit to EPA for approval a list of Target Properties for the Big Island, identified by address, Tax Map Key, land use classification, and (if applicable) the “High Use” category of the property.
2. Big Island Audit Commencement Date shall be thirty (30) days of the date the EPA approves the list of Target Properties on Big Island.
3. iii. A schedule that ensures that the Audit will be completed within the 16 Month timeframe. The length of the audit phase of the Big Island shall be determined using the following calculation: One and one-half (1.5) business days multiplied by the number of Target Properties identified on the Big Island, running from the date Respondent receives EPA’s written approval of the list of Target Properties for the Big Island.

e. Audit Procedures: [To be proposed by Respondent]

- i. In each phase, the Auditor shall inspect or otherwise supervise the inspection of each of the Target Properties for the presence of a LCC. Each

1 inspection shall include but is not limited to a visual inspection of the  
2 Target Property, a review of property records, permits, water use records,  
3 and/or other documentation, and interviews with employees of Respondent,  
4 occupants, tenants and/or lessees, as needed to confirm the presence (or  
5 absence) and location of an LCC.

6 ii. All work will be in accordance with accepted standards of professional  
7 engineering procedures as practiced by members of the local engineering  
8 profession currently practicing in Hawai'i under similar conditions.

9 51. Audit Completion Reports:

10 a. ~~49. Audit Completion Report. Within thirty (30) days after~~ For each phase of the  
11 Audit-Completion Date, Respondent, the Auditor shall submit an ~~prepare a~~  
12 separate Audit Completion Report documenting the findings of the Audit ~~audit of~~  
13 the Target Properties in that phase, including the following:

14 i. ~~a-~~ A description of the iteration(s) of the Efficacy Study for that phase.

15 ii. A description of how the Audit Procedures were followed in completing that  
16 phase of the Audit.

17 iii. ~~b-~~ The number of LCCs located on Target Properties as a result of that phase  
18 of the Audit, a description of each LCC, and a description of how the LCC  
19 was identified and/or confirmed.

20 iv. ~~e-~~ For those Target Properties that were determined not to contain an LCC,  
21 a description of how it was determined that the property did not contain an  
22 LCC and what, if any, other wastewater treatment system is being used.

23 b. The Oahu Audit Completion Report shall be submitted within sixty (60) days of  
24 the Oahu Audit Completion Date.

1 c. The KMM Audit Completion Report shall be submitted within sixty (60) days of  
2 the KMM Audit Completion Date.

3 d. The Big Island Audit Completion Report shall be submitted within ninety (90)  
4 days of the Big Island Audit Completion Date.

5 52. LCC Closures and Schedule:

6 a. ~~50. LCC Closures and Schedule:~~ Within one year The LCC Closure  
7 Commencement Date shall be within thirty (30) days of submission of the Oahu  
8 Audit Completion Report. After the LCC Closure Commencement Date,  
9 Respondent shall ensure that all LCCs identified in the Audit Completion Report  
10 are properly closed close an average of ten (10) LCCs, in accordance with 40  
11 C.F.R. §§ 144.84(b)(2), 144.88(a) and 144.89(a), and all other applicable closure  
12 requirements, including all HDOH closure, conversion, and/or replacement  
13 requirements per every sixteen (16) month period until Respondent has properly  
14 closed all LCCs identified in the Audit.

15 b. Due to the highly variable circumstances surrounding a statewide LCC closure  
16 effort, unexpected circumstances may arise that are beyond Respondent's control  
17 and cause delays in LCC closure efforts without any fault or negligence by  
18 Respondent. Respondent shall not be held responsible for any delay or failure in  
19 performance of any part of this agreement to the extent such delay or failure is  
20 caused by volcanic eruptions, fire, flood, explosion, war, embargo, labor shortage  
21 or stoppage, government requirement (including requirements for permits,  
22 environmental assessments, archaeological and/or cultural surveys), civil or  
23 military authority, act of God, the presence of subsurface, latent, or otherwise  
24 previously unknown conditions of an unusual nature materially differing from  
those ordinarily encountered and generally recognized as inherent in the type of

1 work to be performed (including without limitation the presence of  
2 environmental contamination, blue rock or historic remains), or any other causes  
3 beyond Respondent's control and without the fault or negligence of Respondent.  
4 If such conditions arise, Respondent shall promptly notify the EPA in writing of  
5 such conditions. Respondent and EPA shall negotiate in good faith to provide  
6 for a difference in completion time for the particular LCC closure or closures  
7 affected by such conditions.

8 53. ~~51. Final LCC Closure Report:~~ Within ~~Thirty~~thirty (30) days of the closure of the  
9 last identified LCC, or the end of the one-year closure period following submission of the Audit  
10 Completion Report, whichever is earlier, Respondent~~the Auditor~~ shall submit a Final LCC  
11 Closure Report documenting completion of the LCC closure steps to EPA that includes the  
12 following:

- 13 a. A description of how each LCC was closed;
- 14 b. Copies of all design plans for all IWSs used to replace the LCCs; stamped and
- 15 approved by HDOH;
- 16 c. Copies of HDOH's approval to operate each IWS;
- 17 d. Copies of hookup sewer approvals; and
- 18 e. Copies of the Backfill Closure Report for each LCC.

19 To the extent HDOH approvals for are not available at the time the Final LCC  
20 Closure Report is due, the Final LCC Closure Report will provide evidence that Respondent  
21 diligently sought and/or applied for such approvals. Respondent shall promptly provide copies of  
22 such HDOH approvals once Respondent receives them.

23 54. Respondent and EPA acknowledge that given the large number of properties  
24 owned by Respondent and the complexity of the Audit, there is a reasonable possibility that  
Respondent's compliance with the requirements of the Audit, Respondent later identifies.

*In re Kamehameha Schools*

1 additional LCCs on one or more of its properties. Respondent and EPA agree that Respondent  
2 shall remain eligible for the 100% mitigation of gravity-based penalties set forth in Paragraph 49  
3 so long as Respondent complied in good faith with the terms of this CA/FO in conducting the  
4 Audit and promptly self-reports any new LCCs it discovers after the Audit period.

5 55. ~~52.~~ The Audit shall not affect EPA's right to bring a claim or cause of action other  
6 than those specified in Section IIIIV of this CA/FO, including a claim or cause of action for an  
7 LCC violation that could have been, but was not, reported, mitigated, and paid pursuant to this  
8 CA/FO.

9 56. ~~53.~~ Respondent shall bear all costs associated with the Audit, except as otherwise set  
10 forth in any Opt-In Agreement(s).

11 //

12 //

13 D. Stipulated Penalties

14 57. ~~54.~~ If Respondent fails to pay the assessed civil administrative penalty specified in  
15 Paragraph 3637 by the deadline specified in Paragraph 37,38, Respondent agrees to pay in  
16 addition to the assessed penalty, a stipulated penalty of \$250 per day for each day the payment is  
17 late.

18 58. ~~55.~~ Respondent agrees to pay any stipulated penalties within thirty (30) days of  
19 receipt of EPA's written demand for such penalties. All penalties shall begin to accrue on the  
20 first date of noncompliance, and shall continue to accrue through the date of completion of the  
21 delinquent CA/FO requirement. Respondent will use the method of payment specified in  
22 Paragraphs 3840 and 39,41, and agrees to pay interest, handling charges and penalties that accrue  
23 for late payment of the stipulated penalty in the same manner as set forth in Paragraphs 4042  
24 through 42,44.

*In re Kamehameha Schools*



U.S. Environmental Protection Agency  
75 Hawthorne Street  
San Francisco, CA 94105

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*In re Kamehameha Schools*

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1  
2 **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
3 **REGION IX**

4 75 Hawthorne Street  
5 San Francisco, California 94105

6 IN THE MATTER OF:  
7 99-1622 Piimauna Drive, Volcano, HI 96785

DOCKET NO. UIC-09-2017-\_\_\_\_\_

8 Kamehameha Schools  
9 Respondent.

**CONSENT AGREEMENT  
AND  
FINAL ORDER**

10 Proceedings under Sections 1423(c) of the Safe  
11 Drinking Water Act,  
12 42 U.S.C. § 300h-2(c).

**FINAL ORDER**

13 The United States Environmental Protection Agency Region IX (“EPA”), and Trustees of  
14 the Estate of Bernice Pauahi Bishop, doing business as Kamehameha Schools, (“Respondent”),  
15 having entered into the foregoing Consent Agreement, and EPA having duly publicly noticed the  
16 Stipulations and Findings and Final Order regarding the matters alleged therein,

17 **IT IS HEREBY ORDERED THAT:**

- 18 1. The foregoing Consent Agreement and this Final Order (Docket No.  
19 UIC-09-2017-\_\_\_\_\_) be entered;
- 20 2. Respondent pay an administrative civil penalty of **\$99,531** dollars to the Treasurer  
21 of the United States of America in accordance with the terms set forth in the Consent Agreement;
- 22 3. Respondent comply with all other requirements of the Consent Agreement.

23 This Final Order is effective on the date that it is filed. This Final Order constitutes full  
24 adjudication of the allegations in the Consent Agreement entered into by the Parties in this  
proceeding.

*In re Kamehameha Schools*

Date: \_\_\_\_\_

1 [Insert RJO's name]  
2 Regional Judicial Officer, Region IX  
3 U.S. Environmental Protection Agency  
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*In re Kamehameha Schools*

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